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QUASI-CONTRACTUAL OBLIGATIONS

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For the perfect understanding of any one branch of the law, a knowledge of the whole field is required. The law is indeed "a seamless web." This is exceptionally true of quasi-contractual obligations. But no attempt can be made in this article to classify law as a whole, or even to discuss at length the one great field of *obligations*. An attempt will be made, however, to determine just what obligations may properly be called quasi-contractual.

Legal obligations form one large class, within which there are many different species. No doubt it serves a useful purpose to define these species and to treat them under separate headings and in separate volumes. So, obligations arising out of an agreement of two parties are called contractual, the fact of agreement and its expression being called a contract; and obligations arising from illegal acts causing injury to others are called delictual, the illegal act being called a tort. But our courts have long enforced other obligations that do not readily fall within the foregoing classes. Centuries before the time of Justinian, Roman jurists were referring to these obligations as quasi-contractual or quasi-delictual. From that day to this, however, jurists have very generally used these terms without drawing distinct lines between their various fields, and without showing any very clear bond of unity within the limits of any one field. This fact goes far to show, indeed, that the facts of life giving rise to obligations are so inter-related that it is exceedingly difficult to classify them. It

is universally agreed, however, that a *contractual* obligation arises out of an agreement of the parties, while a *quasi-contractual* obligation is independent of agreement. A few instances may serve to show that even this distinction does not *in practice* enable us to classify some cases with certainty.

In a certain case A sent a telegram offering to sell lath to B at \$2.10 per thousand, but the telegraph company delivered it to B reading \$2.00 per thousand. B accepted the offer as delivered. There is no agreement of the parties, and yet it was held that A was bound to deliver at \$2.00 per thousand.¹ It cannot be said that this obligation arises from an agreement, but it is said that there is a *contract*.

Again, A offers to sell his land to B for \$5,000 and B accepts. A intended to sell for that price subject to a then existing mortgage of which B knew nothing. The law holds A contrary to his intention.² There is no agreement in the sense of a common intention or meeting of the minds; but the courts say that there is a contract. Of course there may be said to be an agreement *in expression*, but this is no meeting of the minds.³

In such cases as the above, the obligation is clearly contrary to the will of A. But it may be convenient to continue to classify such cases among contracts. This is the case, particularly because it is seldom possible to determine conclusively whether there was an agreement in intention or not; A may be lying as to what his intention was. It is practicable, on the other hand, to attempt to determine whether or not there has been an agreement in expression. Such cases show that obligations arising from an agreement of the minds are not *in practice* distinctly separable from those arising otherwise.

There is another large field, always included under the heading of contracts, where the same difficulty of classification exists. The law in regulating the performance of a contract and determining liability for non-performance oftentimes construes an agreement in a way never dreamed of by the parties at the time they made it, "Conditions" are said to be implied by the law. When a contract is held to be conditional, although in its terms

¹ *Ayer v. West. U. Tel. Co.*, 79 Me., 493.

² *Mansfield v. Hodgdon*, 147 Mass., 304.

³ See further *Holland, Juris.*, ed 10, p. 253; *Anson, Cont.*, ed. 10, p. 9; *O'Donnell v. Clinton*, 145 Mass., 461-463.

it appears to be unconditional, the enforceable obligation does not seem to arise entirely out of agreement, either of intention or of expression.

Thus where A promises to deliver goods and B promises in return to pay the price, the promises are the consideration for each other and are both binding. The contract does not express that B shall not be liable to suit unless A tenders a delivery of the goods, and the parties may not have thought about it at all. But the law says it. Tender is made a condition precedent.⁴

Of such conditions Professor Holland says: "Supposing a contract to have been duly formed, what is its result? An obligation has been created between the contracting parties, by which rights are conferred upon the one and duties are imposed upon the other, partly stipulated for in the agreement, but partly also implied by law, which, as Bentham observes (works, III, p. 190) 'has thus in every country supplied the shortsightedness of individuals by doing for them what they would have done for themselves, if their imagination had anticipated the course of nature.'"⁵

So also, when an agreement is by its terms expressly made conditional, but the Court for some reason enforces it though the condition has not been fulfilled, the defendant's obligation certainly does not wholly arise from an agreement, either of intention or of expression. An insurance company issued a policy, in which it was provided that in case of dispute the liability of the company should cease unless suit should be brought within one year. The Civil War broke out after the loss occurred, making it exceedingly difficult for the insured, a resident of Mississippi, to bring a suit within the year. He sued after the war for the amount of the policy, and his suit was sustained.⁶

A contractor agreed to build a house, and in return the owner promised to pay a certain sum after the architect's certificate of exact performance should be produced. The work was not very well done and the architect refused to give his certificate. Nevertheless the contractor was allowed to maintain suit on the owner's promise, the owner being allowed merely to counterclaim.⁷

Similar difficulties arise in distinguishing between a quasi-contract and a tort. A tort is said to be a civil wrong independent

⁴ *Morton v. Lamb*, 7 T. R., 125.

⁵ *Juris.*, ed. 10, p. 278.

⁶ *Semmes v. Hartford Ins. Co.*, 13 Wall., 158.

⁷ *Nolan v. Whitney*, 88 N. Y., 648.

of contract, an illegal act doing damage. The obligation to pay damages for the act is said to be delictual. But according to the common law, the injured party is often allowed to waive the tort and sue in assumpsit. If A converts B's property to his own use and sells it for a sum certain, B may sue in various tort actions; but he may sue also, if he desires to do so, in assumpsit for the proceeds received by A from the sale. A is under an obligation to turn over those proceeds. This obligation is said to be quasi-contractual; and yet it arises from a civil wrong.

Before attempting a definition, it may be of service to give a brief survey of the obligations commonly called quasi-contractual. It will be seen that they are very numerous, that some of them have little in common with others, that some more closely resemble contractual obligations while others approach more nearly to torts, and that in the past, in treatises upon the common law, they have generally been handled under diverse headings. During the period when the substantive law was controlled by the forms of procedure, they were classified as contractual or delictual, in accordance with the form of action maintainable to enforce them.

JUDGMENTS.

If one party sues another and obtains a judgment, that other is under a legal obligation. The common law enforced this obligation in the action of debt;⁸ but if the judgment was in a foreign court or in a court not of record, the action might be assumpsit.⁹ However, despite the fact that these actions are known as *ex contractu*, it is clear that the obligation is purely legal and is not contractual. The obligation arises from the order of the Court and not from agreement. Even in cases based upon a contract, the judgment is usually for damages, an entirely different thing from the thing that was promised. A judgment based upon a contract may be within the protection of the United States Constitution,¹⁰ but other judgments certainly are not;¹¹ and in no case can the obligation of the judgment be said to be contractual. It has been classified by recent writers among quasi-

⁸ *Williams v. Jones*, 13 M. & W., 628.

⁹ *Dupeix v. DeRoven*, 2 Vernon, 540; *Grant v. Easton*, 13 Q. B. D., 302.

¹⁰ Art. I, Sec. 10; *Nelson v. St. Martin's Parish*, 111 U. S., 716, 720.

¹¹ *Peerce v. Kitzmiller*, 19 W. Va., 564; *La. v. New Orleans*, 109 U. S., 285.

contracts.¹² It must be noted that any suit based upon a judgment is for the specific performance of the judgment, and is not for damages.

STATUTORY, OFFICIAL, AND CUSTOMARY OBLIGATIONS.

In certain cases an obligation may be put upon a party by reason of a statute or other law, or by custom, particularly where the party holds some office. It has been held that *assumpsit* lies to recover an amount due by custom for "Waiaige," "Wharfage," "Cranage," and the like.¹³ If a sheriff levies on goods under a writ of execution, but fails to return the proceeds into court, the judgment creditor may sue him in debt.¹⁴ A statute may make it the duty of a shipowner to employ a certain pilot, and to pay him a certain fee in any case. The pilot may sue in admiralty for the fee, even though he rendered no service.¹⁵ So also, where a statute provided that anyone might break a log jam, and recover the cost thereof from the owners of the logs, it was held that *assumpsit* lay.¹⁶

Such obligations as these are based on neither contract nor tort, and have been classified as quasi-contractual.¹⁷ In all such cases the suit is for specific performance of the duty and not for damages, and the contractual forms of action are available.

¹² Ames, *History of Assumpsit*; Scott, *Cases on Quasi-Contracts*; Keener, *Quasi-Contracts*, p. 16.

¹³ *City of London v. Goree*, 3 Keble, 677.

¹⁴ *Speake v. Richards*, Hob., 206; *King v. Moore*, 6 Ala., 160.

¹⁵ *The Francisco Garguilo*, 14 Fed., 495; *Steamship Co. v. Joliffe*, 2 Wall, 450.

¹⁶ *Woods v. Ayres*, 39 Mich., 345.

¹⁷ Ames, Keener, and Scott, *supra*. These writers have also classified the obligation of an innkeeper to receive guests and to keep their property safely, and the like obligation of a common carrier, as quasi-contractual. With this the present writer disagrees. At the common law these obligations have been treated as based on contract or on tort. The customary duty of the carrier, inn-keeper, farrier, surgeon, and the like, was to act rather than to forbear, it is true, and to act with the degree of care and skill customarily required; but the form of action was in tort, if based solely on the custom and not on an agreement, and the remedy was compensatory damages measured by the extent of the plaintiff's loss. This is just the same as where one is injured through the defendant's negligent failure to act. See also Holdsworth, *History of English Law*, Vol. 3, p. 331; *Digest Just.*, 44, 7, 5, Sec. 5, per Gaius; *Digest Just.*, 4, 9.

WAIVER OF TORT.

At common law one who has suffered by the tort of another may, in many cases, choose between two sorts of remedies. He may sue in a tort action for compensatory damages, the recovery being in no way measured by the amount of profit secured by the defendant. Or he may, as it is said, waive the tort and sue in assumpsit, in which case his recovery is limited by the amount by which the defendant has been unjustly enriched. The obligation in this latter case has been said to be quasi-contractual. In such cases as this it must certainly be admitted that the obligation arises out of a tort. But for the defendant's tort, he would be under no obligation; and the plaintiff must allege and prove the commission of that tort in order to win his case, whether his action is in trover or trespass or assumpsit.¹⁸ But the obligation enforced by the law in a tort action is somewhat different from that enforced in assumpsit. In tort, it is measured by the amount of damage done to the plaintiff; in assumpsit, it is measured by the amount of the defendant's unjust enrichment. This difference and the difference in the form of action, are the only reasons for taking the obligation enforced in assumpsit out of the realm of obligations *ex delicto*.¹⁹

MONEY PAID BECAUSE OF FRAUD OR COMPULSION.

One who obtains money or property from another by fraud or by duress of person or goods,²⁰ or by virtue of a judgment afterwards reversed,²¹ may be held liable in assumpsit. Taxes illegally assessed may sometimes be so recovered.²² Where one is compelled to pay money to a third person, which the defendant was legally bound to pay, the defendant must reimburse the one so paying.²³ Illustrations of this are found in the rights of contribution and indemnity in favor of a surety²⁴ or of a joint tort-feasor,²⁵ in the

¹⁸ See Keener, *Quasi-Contracts*.

¹⁹ See on this whole topic 19 Y. L. J., 221, *Waiver of Tort*.

²⁰ *Smith v. Bromley*, 2 Doug., 696; *Astley v. Reynolds*, 2 Strange, 915; *Tutt v. Ide*, 3 Blatch., 249; *Chandler v. Sanger*, 114 Mass., 364.

²¹ *Hosmer v. Barret*, 2 Root, 156; *Clark v. Pinney*, 6 Cow., 297.

²² *Atwell v. Zeluff*, 26 Mich., 118; *Preston v. Boston*, 12 Pick., 7.

²³ *Brown v. Hodgson*, 4 Taunton, 189.

²⁴ *Deering v. Winchelsea*, 2 B. & P., 270; *Appleton v. Bascom*, 3 Metc., 169.

²⁵ *Bailey v. Bussing*, 28 Conn., 455; *Palmer v. Wick*, L. R., 1894, *Appeal Cases*, 318.

doctrine of general average in admiralty,²⁶ and in the obligation of a divorced husband to reimburse his former wife for expenses incurred by her in the support of their children.²⁷ The same obligation has been held to exist where one pays under compulsion money that another *ought* to have paid, even though that other was not legally liable.²⁸

BENEFITS CONFERRED WITHOUT REQUEST.

In some instances where the plaintiff has voluntarily conferred a benefit upon the defendant without the latter's request, the defendant is obliged to reimburse the plaintiff. Such was the case in Roman law known as *negotiorum gestio*, where one managed another's affairs in the latter's absence, and to the latter's benefit.²⁹ There is some authority that a finder of lost property is entitled to compensation for labor and expense in preserving and repairing the property.³⁰ The maritime law fully recognizes such an obligation in the matter of salvage. Compare also the claim of a warehouseman against the owner of goods that have been deposited with him without the owner's authority. So, if A pays B's debt, and B accepts the benefit of the payment,³¹ or A pays the funeral expenses of one for whose burial B is responsible,³² or furnishes support for the wife or child of B³³ or for a person whom B has contracted to support,³⁴ B is liable in debt or assumpsit to A. Where an occupant of land, honestly believing

²⁶ *Digest of Just.*, 14, 2, 1; *Ralli v. Troop*, 157 U. S., 386, 393.

²⁷ See 21 YALE LAW JOURNAL, 397.

²⁸ *Great Northern Ry. v. Swaffield*, L. R. 9 Exch., 132; *Lewis v. Campbell*, 8 Man. Gr. & S., 541.

²⁹ *Inst. Just.*, 3, 27; *Dig. Just.*, 44, 7, 5; *Bürgerlichesgesetzbuch*, 677 to 687; *Erskine Law of Scotland*, ed. 20, p. 381; *France, Code Civil*, 1372 to 1375; *Police Jury v. Hampton*, 5 Martin N. S. (La.), 389; *In Re Bryant's Estate*, 180 Pa., 192.

³⁰ *Chase v. Corcoran*, 106 Mass., 286; *Nicholson v. Chapman*, 2 H. Bl., 254 (*semble*); *Reeder v. Anderson*, 4 Dana, 193. Weight of authority may be *contra*. Keener, *Quasi-Contracts*, 354; *Falcke v. Scot. Imp. Ins.*, L. R. 34 Ch. Div., 234, 248; *Bartholomew v. Jackson*, 20 Johns., 28.

³¹ *Crumlish v. Cent. Imp. Co.*, 38 W. Va., 390, 395; *Muir v. Craig*, 3 Blackf., 293.

³² *Jenkins v. Tucker*, 1 H. Bl., 90; *Patterson v. Patterson*, 59 N. Y., 574; Keener, *Quasi-Contracts*, 341.

³³ *Cunningham v. Reardon*, 98 Mass., 583.

³⁴ *Forsyth v. Ganson*, 3 Wend., 558; *contra Moody v. Moody*, 14 Me., 307.

that he is the owner, or holding under a contract unenforcible because not in writing, makes improvements, it has been held that he is entitled in equity to maintain suit for the value of such improvements.³⁵ The contrary has been held at common law,³⁶ but the matter has now often been provided for by statute.³⁷ If the owner should ask for any equitable relief against the occupant,³⁸ or should sue at law for the mesne profits,³⁹ the occupant is allowed a recoupment for the value of his improvements.

In cases of the foregoing general class, there is much conflict in the American decisions, many of the judges not having grasped the quasi-contractual principle and having no knowledge of Roman law. Of course, it is too much to expect that we shall have many judges like Lord Mansfield, with a vision broad enough to see the possibilities lying in the action of assumpsit or in the civil action under the codes, and with courage enough to keep the law abreast of the current ideas of morality and the needs of commerce. We must often be content, as best we may, with the little judges of narrow historical perspective and little grasp of principle, who tremble at a new decision and know no law for which cannot be found a precedent on all fours.

FAILURE OF CONSIDERATION BY NON-PERFORMANCE OF A PROMISE.

An unjust enrichment occurs in another large class of cases where there has been an agreement between two parties and one has performed his part without receiving the consideration to which the agreement entitled him. The failure of consideration consists of a non-performance by the defendant of his part of the agreement. His failure to perform his promise may occur under the following circumstances: (1) performance may be impossible; (2) the defendant's promise may be unenforcible because of the defendant's incapacity to contract or because of the statute of frauds; (3) the plaintiff himself, though performing in part, may have broken his own promise; (4) a condition precedent to the defendant's liability may have been unfulfilled, without being an

³⁵ *Bright v. Boyd*, 1 Story, 478, 2 Story, 605; Note in *Scott's Cases, Quasi-Contracts*, p. 320. See also *Williams v. Gibbs*, 20 How., 535.

³⁶ *Welsh v. Welsh*, 5 Hammond (Ohio), 425; *Cook v. Doggett*, 2 Allen, 439.

³⁷ See *Gristwold v. Bragg*, 48 Fed., 519, holding the Conn. "Betterment Act" constitutional.

³⁸ See *Williams v. Gibbs*, 20 How., 535.

³⁹ *Parsons v. Moses*, 16 Ia., 440.

actionable breach of contract by the plaintiff; (5) the defendant's failure to perform his enforceable promise may be wilful and without excuse; (6) performance may be illegal.

(1) If performance by the defendant is impossible, such impossibility will in some instances prevent him from being liable for breach of contract. In such cases the defendant will be under an obligation to pay back whatever he has received.⁴⁰ Such an obligation cannot be said to arise from agreement, and is rightly called quasi-contractual. On the other hand there are cases where impossibility does not relieve the defendant from his obligation and he is liable in damages.⁴¹ In such cases the plaintiff may sue for damages *ex contractu*, or he may rescind the contract and sue for the recovery of what he has paid.

(2) If the defendant fails to perform his part of the agreement, and the plaintiff has no remedy *ex contractu* because of the statute of frauds, he may sue *quasi ex contractu* for the restitution of what he has paid or for the value of what he has done.⁴² If the contract is unenforceable because of the defendant's lack of capacity to contract, the defendant is under an obligation to return what he has received if he still has it, or to pay its reasonable value in case it came within the class known as necessities.⁴³ The defendant's promise may be unenforceable also on the ground of mistake, but the principles governing such cases will be found below under the head of Mistake. Mistake may be a ground for a quasi-contractual obligation where the defendant has made no promise at all, as well as where he has made one.

(3) Where the plaintiff is himself in default on his express contract, his breach may be of a vital part of the contract, or of a subordinate part not "of the essence" and not "going to the root of the consideration." The latter does not justify non-performance on the part of the defendant, and so the defendant is liable in damages. He is still under an obligation *ex contractu*. But here also the plaintiff may rescind the contract because of the defendant's unjustified repudiation, and sue the defendant *quasi ex contractu* for the amount of the defendant's enrichment. This

⁴⁰ *Reina v. Cross*, 6 Calif., 29; *Knowles v. Bovill*, 22 Law Times, 70.

⁴¹ See *Stees v. Leonard*, 20 Minn., 494; *School Dist. v. Dauchy*, 25 Conn., 530. These, however, were cases where the impossibility was not absolute.

⁴² *Hollis v. Edwards*, 1 Vernon, 159; *Jellison v. Jordan*, 68 Me., 373.

⁴³ *Gregory v. Lee*, 64 Conn., 407; *Valentini v. Canali*, L. R., 24 Q. B. D., 167; *Waldron v. Davis*, 70 N. J. L., 788 (lunatic).

is the same as (5) *infra*. If the plaintiff's breach is of a vital part of the contract, it deprives him of any remedy *ex contractu* against the defendant. His performance of that part was either an express condition precedent to the defendant's liability, or was a condition precedent implied by the law.⁴⁴ In such cases, the plaintiff has no quasi-contractual remedy for the value of his part performance, according to the weight of authority.⁴⁵ The determination of whether the breach is of a vital part or not, is made to depend in some measure on whether or not the breach was wilful.⁴⁶

(4) If the plaintiff has no remedy *ex contractu* because of the non-fulfilment of a condition precedent, but such non-fulfilment does not constitute an actionable breach by the plaintiff, the defendant is under a quasi-contractual obligation to pay back the value of what he has received.⁴⁷ Such is the case where further performance by the plaintiff has become impossible because of death and in some other cases.⁴⁸

(5) Where the defendant has broken his contract in a vital matter without excuse, the plaintiff has two remedies—*ex contractu* for damages, or *quasi ex contractu* by rescinding the contract and contenting himself with restitution of what the defendant has received, or its value.⁴⁹

(6) If the contract is illegal, there can be no remedy *ex contractu*. But the law will construct a quasi-contractual obligation in favor of a plaintiff who is not *in pari delicto*.⁵⁰

In such of the foregoing cases as give to the plaintiff a right of action on the contract, as in certain cases under (1), (3), and (5), it may seem that the so-called quasi-contractual right of restitution is really only a remedy on the contract; but just as in the

⁴⁴ See *Shadforth v. Higgin*, 3 Camp., 385; *Worsley v. Wood*, 6 T. R., 710; *Norrington v. Wright*, 115 U. S., 188.

⁴⁵ *Champlin v. Rowley*, 18 Wend., 187; *Stark v. Parker*, 2 Pick, 267; Note in *Scott's Cases, Quasi-Contracts*, p. 741. Contra, *Britton v. Turner*, 6 N. H., 481; *Oxendale v. Wetherell*, 7 L. J., 264.

⁴⁶ See *Pinches v. Swedish Church*, 55 Conn., 183.

⁴⁷ *Wright v. Newton*, 2 Cr. M. & R., 124.

⁴⁸ *Luke v. Lyde*, 2 Burr., 882; *N. Y. Life Ins. Co. v. Statham*, 93 U. S., 24; *Butterfield v. Byron*, 153 Mass., 517.

⁴⁹ *Dutch v. Warren*, 1 Strange, 406; *Clark v. Manchester*, 51 N. H., 594.

⁵⁰ *Musson v. Fales*, 16 Mass., 332; *White v. Franklin Bank*, 22 Pick, 181; but no contribution between highway robbers, *The Highwayman's Case*, *Scott's Cases, Quasi-Contracts*, p. 666.

case of waiver of tort, the plaintiff has the option of putting the defendant under an obligation other than the one created by the agreement. It may be said that an obligation to pay damages for breach of contract is created by the law and not by the agreement, the contractual obligation being *to perform*, not to pay damages for non-performance. The truth of this must be admitted; but to enforce the obligation to pay damages, the plaintiff must prove the contract and its breach, as a part of his cause of action, whereas this is not the case if he has rightfully rescinded the contract and is merely suing for restitution. In the latter case he could sue on the common counts in assumpsit, though no doubt the defendant could take steps that would require the plaintiff to show that he had rightfully rescinded the contract. In addition there is also the difference in the measure of recovery. It must be admitted that this distinction is a narrow one, and that both the obligation to pay damages and the obligation to restore the value received are secondary, remedial obligations created by the law to right the wrong done to the plaintiff. Neither one of them is of the same character as the primary contractual obligation to perform.

MISTAKE.

Where money is paid under the mistaken belief that it was due, when in fact nothing was due, an action will lie to recover it.⁵¹ This was true also under the Roman law⁵² and it is true under all the civil codes based on the Roman law.⁵³ The general principles allowing recovery are the same whether there was an agreement between the parties or not. If there was an agreement, the mistake must be such as to vitiate it or there will be no quasi-contractual obligation.

The obligation to repay in cases of mistake is certainly not based on agreement, and therefore cannot be said to be contractual.⁵⁴ On the other hand, the party to whom the money was paid was not a tort-feasor in receiving it. He is not liable in damages, but only for the exact sum that he received. The obli-

⁵¹ *Lady Cavendish v. Middleton*, 3 Cro. Car., 141; *Mayer v. N. Y.*, 63 N. Y., 455. The English and most of the American courts have improperly drawn a distinction between mistakes of law and mistakes of fact. See *Bilbie v. Lumley*, 2 East, 469; *Brisbane v. Dacres*, 5 Taunton, 144; Note in *Scott's Cases, Quasi-Contracts*, p. 365; *Contra, Culbreath v. Culbreath*, 7 Ga., 64, and *Mansfield v. Lynch*, 59 Conn., 320.

⁵² *Inst. Just.*, 3, 27; *Inst. Gaius*, 3, 91; *Dig. Just.*, 12, 6; *Codex* 4, 5.

⁵³ *Code Civil*, 1376 to 1381; *B. G. B.*, 812 to 822.

⁵⁴ *Inst. Just.*, 3, 27, 6; *Dig.*, 44, 7, 5, Sec. 3, per Gaius.

gation to repay has been said to be quasi-contractual, from the time of Cicero to the present, and in many countries. In the Roman law the form of action for the enforcement of this obligation was called *condictio indebiti*. Under the common law, the form of action was *assumpsit* for money had and received. Under this heading many difficult questions have arisen, and there is much conflict, most of it unnecessary and unreasonable.⁵⁵

A few other specific classes of obligations have been called quasi-contractual, but they will be found to be included under some of the foregoing heads. The mutual rights and obligations as between guardian and ward⁵⁶ are many of them based on neither contract nor tort. The guardian's obligation to account may be regarded as official. His breach of duty is often a tort. His right to compensation and indemnity from the estate of the ward is for benefits conferred, and is often statutory. The mutual rights and obligations of tenants in common and joint heirs⁵⁷ are based upon benefits received, though the common law differs from the civil law in just what those rights and obligations are. The obligation of an heir to pay a legacy charged against the estate is classified as quasi-contractual in the Roman law.⁵⁸ The rights and obligations of a trustee, like those of a guardian, may be regarded in many instances as quasi-contractual, the fact that the remedies are chiefly equitable being an immaterial fact in this classification. In the case of constructive trusts, the character of the obligation is very similar to that in the case of waiver of tort.⁵⁹

It will readily appear from the foregoing survey that the term quasi-contract is not in all respects a fortunate term. It suggests a relation and an analogy between contract and quasi-contract.⁶⁰ The relation is distant and the analogy slight. The

⁵⁵ In particular, in cases involving negotiable instruments and the rights of two innocent parties. *Price v. Neal*, 3 Burr., 1354; *Ellis v. Ohio Life Ins. Co.*, 4 Oh. St., 628; Keener, *Quasi-Contracts*, Chap. 2.

⁵⁶ *Inst. Just.*, 3, 27, Howe, *Studies in the Civil Law*, 274.

⁵⁷ *Inst. Just.*, 3, 27.

⁵⁸ *Inst. Just.*, 3, 27, *Dig.*, 44, 7, 5, Sec. 2, per Gaius.

⁵⁹ Holland, *Juris.* ed. 10, p. 238, 241, classified all fiduciary rights among those arising *ex lege*.

⁶⁰ "The word *quasi*, prefixed to a term of Roman Law, implies that the conception to which it serves as an index is connected with the conception with which the comparison is instituted, by a strong superficial analogy or resemblance. It does not denote that the two conceptions are the

differences are greater than the similarities. But there are now moderately compelling reasons why the term quasi-contract, or quasi-contractual obligation, should not be abandoned. These are chiefly historical, and are as follows: (1) the term is already in use; (2) some general term, excluding torts and contracts, is necessary, and there is no other acceptable one; (3) the obligations included under this head were first recognized and enforced by the courts of common law in the forms of action known as debt and assumpsit, these long having been known as actions *ex contractu*.

(1) To what extent is the term quasi-contract already in use? It may be doubted whether the term is well understood or in very common use among the great body of attorneys at law throughout the United States. But it has long been used by judges who have had some knowledge of the Roman law, and who have been able to conceive of the possibility of a legal obligation neither contractual nor delictual in character.⁶¹ This usage is the usage of the leaders of our jurisprudence,⁶² and has become so general that a newly coined term could not make its way. This seems to be true despite the fact that the term is not truly descriptive of its content, and despite the fact that it has been rejected by high authority.⁶³ In addition to this English and American usage, the term has a

same, or that they belong to the same genus. On the contrary, it negatives the notion of an identity between them; but it points out that they are sufficiently similar for one to be classed as a sequel of the other, and that the phraseology taken from one department of law may be transferred to the other and employed without violent straining, in the statement of rules which would otherwise be imperfectly expressed." *Maine Ancient Law*, ed. 4, p. 344. In fact, in this case the phraseology of contracts cannot always be employed in quasi-contract "without violent straining," and the attempt to employ it has led to error and injustice.

⁶¹ Lord Mansfield in *Moses v. Macferlan*, 2 Burr., 1005; Holmes, J., in *Cahill v. Hall*, 161 Mass., 512; *Sceva v. True*, 53 N. H., 627; *Richards v. Bickley*, 13 Serg. & R., 395; *Gregory v. Lee*, 64 Conn., 407.

⁶² Adam Smith, *Lectures on Justice*, in 1763; Sir Wm. B. Evans, *Essay on Action for Money Had and Received*, 1802; Bracton on the *Laws and Customs of England*; Austin, *Lectures on Jurisprudence*, 1832; Maine, *Ancient Law*, 1861; Ames, *History of Assumpsit*, 1888; *Works on Contracts*, by Anson, Pollock, Clark; Keener on *Quasi-Contracts*; *Case Books*, by Scott and Woodruff.

⁶³ Holland (*Juris.*, ed. 10, p. 238, n. 2) objects to the term quasi-contract and criticises Keener's definition of the term. Girard (*Manuel de Droit Romain*, ed. 4, 388 to 389) criticises the use of the term by Gaius in the *Digest* 44, 7, 5, and in the *Inst. of Just.*, 3, 13 and 27, and uses as

long history in Roman and European law. *Obligationes quasi ex contractu* were recognized in the Roman law as being distinct in character from contract and tort,⁶⁴ though the Roman lawyers are as indefinite as are modern writers in their definition and in their determination of just what particular obligations are included. The Roman usage has been followed in the codes of France, Louisiana, and other codes derived from the Code Napoleon,⁶⁵ and in the law of Scotland;⁶⁶ but seems not to have been adopted in the German civil code, such obligations there being treated under their individual titles only.⁶⁷

(2) The only term already in use in the common law that might compete with quasi-contract is "contract implied in law." This has all the defects of the term quasi-contract, and many more besides, and has led to misunderstanding and error.⁶⁸ It has often been used by the courts so as to be confused with a contract implied in fact. A contract implied in fact is a true contract

his title "*Variae causarum figurae*," also taken from Gaius, *Dig.* 44, 7, 1. This last term is certainly "*un peu vague*," as Girard admits. Moyle (*Inst.*, ed. 3, p. 396) calls the term "*Variae causarum figurae*" a "perplexing expression." It certainly amounts to a division of obligations into three classes as follows: contractual, delictual, and *others*. The expression may be more accurate than quasi-contract, but it would make no headway in English.

⁶⁴ *Inst.*, 3, 13 and 27; *Dig.*, 44, 7. The specific obligations mentioned in the institutes by no means cover the entire ground.

⁶⁵ France, *Code Civil*, 1372-1381; *La. Civil Code*, 2293; Howe, *Civil Law*, 269; *Spanish Code*, 1887-1901; *Italian Code*, 1140-1150.

⁶⁶ Erskine, *Law of Scotland*, ed. 20, p. 381.

⁶⁷ B. G. B., 323; 677-687, *Negotiorum Gestio*; and 812-822, Unjustified Benefits. Windscheid (*Lehrbuch des Pandektenrechts*, Sec. 362, n. 1, and Sec. 421) uses a term similar to quasi-contract, "Forderungsrechte aus vertragsähnlichen Gründen." He also says, Sec. 302, n. 1, "Die Neueren sprechen von Quasi-Contracten und Quasi-Delicten."

Schuster, *German Civil Law*, Sec. 143, says: "It was customary in the old text books to classify all obligations as being *ex contractu*, *quasi ex contractu*, *ex delicto*, *quasi ex delicto*; but this mode of classification has now been completely abandoned. There is now a broad line of demarcation between obligatory rights created by act-in-the-law (*Rechtsgeschäft*), and other obligatory rights. The latter may be subdivided under two principal heads, namely: (1) remedial obligatory rights; (2) obligatory rights conferred by outside circumstances." This classification can not be said to be any improvement. In fact there is no legal term in English corresponding to *Rechtsgeschäft*. Most of our quasi-contractual obligations fall under subdivision (2).

⁶⁸ See Keener, *Quasi-Contracts*, Chap. 1.

based upon a real agreement of the parties. It differs from an express contract only in the evidence necessary to establish its existence and its terms. In reality a contract implied in fact is an express contract, for intentions can be *expressed* as clearly by actions as by words. Where there has been no expression of intention to agree, either by words or by acts, there is no contract whatever; and in cases like this courts have sometimes refused a remedy on the erroneous supposition that there can be no remedy unless there is a contract express or implied.⁶⁹ In numberless instances the courts have said that where the parties have made an express contract the law will never imply a different one. This is quite true, if a contract implied in fact is meant; for where the agreement has been put into express words, those words are conclusive as to the intention of the parties. But many cases have been shown above where the law will create an enforceable obligation, other than the contractual one, despite the fact that the parties have made an express contract.

(3) The term contract implied in law came to be used in the common law because obligations neither contractual nor delictual were enforced in the so-called actions *ex contractu*, debt, account, and assumpsit. This fact makes the term quasi-contract seem somewhat less unnatural than it otherwise would, and is perhaps a reason for retaining it.

The action of debt was originally used for the purpose of enforcing a property right or right *in rem*, and such other rights as the primitive mind pictures in his imagination as a property right. A debt was regarded as a different thing from a contract. The thing owed was some specific thing that had been *granted* to the creditor. So the action of debt was an action for the specific enforcement of a legal duty, often quasi-contractual in character rather than contractual. The earlier legal mind conceived of a right to a specific sum of money as being of the same character as a right to any other specific property,⁷⁰ and debt lay to recover this specific sum because the plaintiff owned it, not because the defendant had promised it. So, specific sums due by statute, custom, or judgment, or by unilateral contracts where the *quid pro quo* had passed to the defendant,⁷¹ were collectible in debt.

⁶⁹ *Kellogg v. Turpie*, 93 Ill., 265; *Ferguson v. Carrington*, 9 Barn. & C., 59; *Rayburn v. Comstock*, 80 Mich., 448 (last paragraph).

⁷⁰ See Maitland, *Lectures on Equity and Forms of Action*, 357.

⁷¹ Salmond, *Essays in Juris.*, 181-182; Holdsworth, *History of English Law*, Vol. 3, p. 283, 326.

The action is a contractual action in the last case, where there was a true agreement; in the other cases it is not. But the action of debt came to be called contractual, because in the majority of cases where it was used there was in fact an agreement, and a debt came to be called a contract. So in English history we do not need so much to explain why quasi-contractual obligations came to be enforced in the action of debt, as to explain why debt came to be called a contractual form of action.⁷²

The action of account had a similar history, being first of a quasi-contractual character and founded upon property rights,⁷³ its use becoming proper also where there was an agreement, until finally it was superseded by assumpsit and by a bill in equity.

The use of the action of assumpsit to enforce quasi-contractual obligations has been well explained.⁷⁴ But inasmuch as debt and true indebitatus assumpsit are nearly identical, it was natural enough for the latter to replace the former in quasi-contractual cases as well as in contractual ones. Further, assumpsit is of tort parentage, and it does not seem unnatural to use it in cases of waiver of tort. The action on the case was the action most easily extensible to new obligations which society acting through its courts might desire to create and enforce. However, assumpsit is used to enforce quasi-contractual obligations only in those cases where it is being used as a substitute for debt.

Express assumpsit, an action upon a special promise, is always more of the common counts that are used. However, there is *ex contractu*, and the measure of recovery is the damage suffered by the promisee in not getting the thing promised. The common counts also may be used to enforce an express agreement, but it is only in cases where debt also would lie, where there is a specific sum of money due from the defendant, or where the contract was not wholly express and the law creates a partly quasi-contractual obligation to pay a reasonable sum. When assumpsit is brought to enforce a quasi-contractual obligation, it is generally one or more of the common counts that are used. However, there is no objection to a plaintiff's stating a quasi-contractual obligation in the form of a special (uncommon) count.⁷⁵ It therefore

⁷² See Anson, *Contracts*, chapter on quasi-contracts.

⁷³ See Holdsworth, *History of English Law*, Vol. 3, p. 323; Vol. 2, Pol. & Mait., 219.

⁷⁴ Ames, *History of Assumpsit*.

⁷⁵ *Bachelder v. Fisk*, 17 Mass., 464; *Merchants Ins. Co. v. Abbott*, 131 Mass., 397; *Reina v. Cross*, 6 Calif., 29; *Knowlman v. Bluett*, L. R., 9 Exch., 307.

appears that the character of the cause of action, as to its being contract or quasi-contract, cannot be determined from the *form* of the plaintiff's count in assumpsit. It depends upon the facts and the proof. The action is contractual if the plaintiff proves a real agreement, express or implied in fact, and asks for damages for its breach. Assumpsit in any other case is quasi-contractual.

The same may be said of debt, of account, of a bill in equity, of a libel in admiralty, of a case brought before an arbitrator, of a civil action under the codes. Any of them may be used to enforce either a contract or a quasi-contract. The distinction is one of substance, not of form, and depends upon the facts and the proof.⁷⁶ A quasi-contract has been defined as a legal obligation enforced by contractual remedies. This is a correct statement, but it is not a definition for the reason that it does not enable us to know a quasi-contract when we see it. All obligations are legal obligations and all courts give contractual remedies. If it means "contractual remedies at common law," the definition is altogether too limited, and it would mean nothing in States that have adopted the civil action as the universal form. For many reasons, the definition of quasi-contract cannot be made to depend upon the form of pleading. Our courts, now that they have equitable jurisdiction and have the civil action at their command, must not refuse to enforce a quasi-contractual obligation merely because they cannot find a precedent in debt or assumpsit, or merely because some court of common law held that debt or assumpsit would not lie. Maitland has said: "The forms of action we have buried, but they still rule us from their graves."⁷⁷ It is time for us to lay their ghosts. The civil action, with the Lord Chancellor on its right hand and the Lord Chief Justice on its left, need not be frightened at the apparition of assumpsit or debt, any more than we now tremble before *mort d'ancestor* or *novel disseisin* whose ghosts are laid.

It has been made to appear above that obligations may be classified according as they arise *ex contractu*, *ex delicto*, and otherwise (*ex variis causarum figuris*).⁷⁸ This third class is

⁷⁶ *Williams v. Jones*, 13 M. & W., 628 (debt); *Lockwood v. Kelsea*, 41 N. H., 185 (assumpsit for money had and received); *The Francisco Garguilo*, 14 Fed., 495 (libel in admiralty); *Bright v. Boyd*, 1 Story, 478, 2 Story, 605 (bill in equity).

⁷⁷ *Lect. on Eq. and Forms of Action*, 296.

⁷⁸ *Gaius, Dig.*, 44, 7, 1.

further divided into obligations *quasi ex contractu* and obligations *quasi ex delicto*. Let us now proceed to their formal definition.

Contractual obligations are those arising from an agreement of two parties, and are enforced either specifically or by giving the obligee damages in money equivalent to the thing that the contract entitled him to receive. To make out a cause of action, the agreement and its breach must be proved. The obligation to *perform* is primary and antecedent;⁷⁹ the obligation to pay damages is secondary and remedial. Both, however, are always classified as contractual.

Obligations *ex delicto* are those arising from a tort, an illegal act other than a breach of contract, and are enforced by giving to the obligee compensatory money damages equivalent to the amount of his loss. It is always a secondary and remedial obligation. The primary, antecedent obligation, the breach of which is a tort, is not an obligation *ex delicto*. It is like the obligation not to commit a crime, enforced against sane persons only by threats of punishment, and not by action. It is the correlative of a right *in rem*, not of a right *in personam*.

Obligations *quasi ex delicto* are hardly known as such in the common law. The Roman lawyers divided torts into two classes, those where the wrongdoer was personally and actively at fault and those where he was not. The latter were said to give rise to an obligation *quasi ex delicto*. Such were torts of a servant for which the master was held responsible, or the tort of negligence.

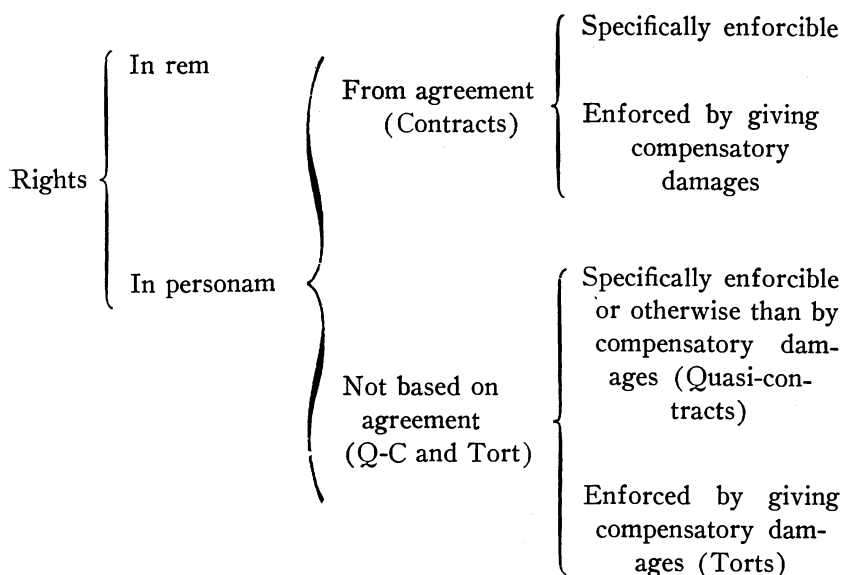
All other obligations must be *quasi ex contractu*. A review of these other obligations, as set out in the earlier part of this article, shows that they have the following things in common: they are not based upon agreement; when they are primary in character, they are specifically enforced; when they are of a remedial character, the remedy is restitution of what the defendant has received and is never compensatory damages. Therefore, a *quasi-contract* is a legal obligation, not based upon agreement, enforced either specifically or by compelling the obligor to restore the value of that by which he was unjustly enriched.

The two essential features of this definition are the lack of mutual consent and the omission to measure the damages done to the obligee. Quasi-contract differs from contract in the first named feature—the lack of agreement. It differs from tort in

⁷⁹ See Holland, *Juris.*, Chaps. 12 and 13.

the second feature—the character of the remedy. There are other differences between particular quasi-contracts and contracts, and between particular quasi-contracts and torts; but the above seem to be the only universally distinguishing features, and an obligation possessed of these two features is certainly a quasi-contract.

The field of quasi-contractual rights and obligations may be shown by the following diagram:



In the above outline and definition, specific enforcement does not mean merely the equitable remedy of that name. Obligations are specifically enforced in other courts than equity. The action of debt at common law is as truly an action for specific performance as is a bill in equity. The judgment in debt specifically enforces the defendant's obligation to pay, with incidental damages perhaps. But incidental damages are also obtainable in equity. Certain obligations may also be specifically enforced in *indebitatus assumpsit* and by a libel in admiralty and in other ways. Wherever the remedy may be sought, the obligation is quasi-contractual if it is not based on agreement and is enforced otherwise than by compensatory damages.

The correlative of an obligation is a right. A quasi-contractual right is any right *in personam* that arises by act of the law inde-

pends of agreement, and is either specifically enforceable or measured by the amount of the defendant's enrichment.

A quasi-contract cannot be distinguished from a contract or tort on the ground that the obligation is created by the law. All enforceable obligations are created by the law.⁸⁰ One is under an obligation when he is subject to compulsion. In all cases the compulsion is from society, acting through the courts as its agents. Society may exert its force through other agents, but we are not now concerned with them. If a party makes a valid contract to convey land, society may enforce this primary obligation specifically in equity, or it may substitute a secondary obligation to pay damages and enforce that, or under some circumstances it may permit a rescission and compel restitution of the price paid. The last alternative is quasi-contractual; but the obligation is societal and legal in all three cases. The same is true of torts. Society may specifically order us by injunction not to destroy property; or society may create and enforce a secondary obligation to pay for all damage caused by the tort. In either case the obligation is legal, the compulsion is societal.⁸¹

It has been said that the courts extended contractual remedies to enforce quasi-contractual obligations, because "to discharge the obligation imposed by quasi-contract one must act," "while to

⁸⁰ "An obligation is a legal bond, with which we are bound by a necessity of performing some act according to the laws of our State." *Inst. of Just.*, 3, 13.

"An obligation, as its etymology denotes, is a tie, whereby one person is bound to perform some act for the benefit of another. In some cases the two parties agree thus to be bound together, in other cases they are bound without their consent. In every case it is the law which ties the knot, and its untying, '*solutio*', is competent only to the same authority." Holland, *Juris.*, ed. 10, p. 236.

"Si l'on considère la force juridique de l'obligation, l'action qui en fait un *vinculum juris*, toute obligation vient de la loi: car c'est la loi qui, dans tous les cas possibles, organise les moyens de coercition sans lesquels il ne peut y avoir que les obligations *naturelles*. Sous ce rapport, aucune distinction n'est possible: toutes les obligations viennent de la loi." F. Mourlon, *Code Civil*, Vol. II, Sec. 1660. See also Baudry-Lacantinerie and Barde, *Droit Civil*, Vol. III des obligations, p. 1040; Savigny, *Obligationenrecht*, p. 4.

⁸¹ Holland (*Juris.*, ed. 10, p. 238) having classified quasi-contractual rights among antecedent rights *in personam*, further defines them as rights *ex lege*, in opposition to rights *ex contractu*. This description is defective, because, as he himself has shown, all obligations are *ex lege*.

avoid committing a tort one need only to forbear."⁸² This comes near to indicating a distinction upon which a definition may be based; but it does not afford a certain test. Most contracts, it is true, require positive action rather than forbearance; but a very large number require forbearance. Furthermore, it is not true that all torts are breaches of a duty to forbear. Surely the tort of negligence is generally the breach of a duty to act.⁸³ Therefore, it would not do to define a quasi-contract as a breach of a duty to act, arising independently of agreement.

It is readily to be seen from the foregoing survey and attempt at definition, that the term quasi-contract is not at all a fortunately chosen term. But there are indeed inherent difficulties, due to the great variety of obligations to be described, that made the choosing of a better term difficult two thousand years ago, and make it still difficult to-day.⁸⁴

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⁸² Keener, *Quasi-Contracts*, p. 15. "It resembles the true contract, however, in one important particular. The duty of the obligor is a positive one, that is, to act." Ames, *Hist. of Assumpsit*.

⁸³ Negligence is defined by Austin (*Lectures*, II, p. 103) as the inadvertent omission to act as one ought, distinguishing it from heedlessness and rashness.

"The omission to do something which a reasonable man would do, or the doing of something which a reasonable man would not do." Alderson, B., in *Blyth v. Birmingham W. Co.*, 11 Ex., 781.

"Negligence may consist either *in faciendo* or *in non faciendo*, being indeed either non-performance, or inadequate performance of a legal duty." Holland, *Juris.*, ed. 10, p. 111.

⁸⁴ The use of the term quasi-contract in the French Civil Code is now severely criticised in France, but the commentators must perforce use the term.

"L'idée de quasi-contrat est particulièrement critiquable. Aucun fait n'a un caractère *presque contractuel*. Ceux que l'on désigne sous le nom de quasi-contrats, ne sont nullement comparable a des contrats. En effet, les obligations y prennent naissance indépendamment de tout accord de volontés, et même, du moins dans certains cas, sans la volonté du débiteur, Ces faits sont, par conséquent, dépourvus de l'élément qui est de l'essence même des contrats." Baudry-Lacantinerie and Barde, *Droit Civil, des Obligations*, Vol. III, pp. 1040, 1041. To the same effect, Girard, *Droit Romain*, ed. 4, p. 389. Of the term quasi-contract, Rambaud (II *Droit Romain*, 300) says: "Cette désignation ne se trouve pas, il est vrai, dans les textes, mais elle a été employé par Pothier et reproduite par notre Code civil, et nous nous en servons également pour la commodité du langage." See also Bry, *Droit Romain*, ed. 5, p. 459; and G. May, *Droit Romain*, ed. 8, p. 238.

The definition in the French code is entirely inadequate. Art. 1371. "Les quasi-contrats sont les faits purement volontaires de l'homme, dont il résulte un engagement quelconque envers un tiers, et quelquefois un engagement réciproque des deux parties." See F. Mourlon, *Code Civil*, Vol. II, 1660, 1661. This definition is repeated in the Louisiana code, merely limiting it by adding the adjective "lawful." Howe, *Civil Law*, 269.

Bracton defined quasi-contracts as those "quae nec omnino ex pacto, nec omnino ex maleficio (oriuntur), sed tamen majorem cum pactis habent affinitatem, quam cum maleficiis." His illustrations are identical with those given in the *Institutes of Justinian*. See Güterbock, *Bracton and His Relation to the Roman Law*.